HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 269 w/CS Civil & Criminal Jurisdiction Over Indian Reservations
SPONSOR(S): Arza
TIED BILLS: None **IDEN./SIM. BILLS:** SB 424

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal Justice (Sub)	4 Y, 3 N	Kramer	De La Paz
2) Public Safety & Crime Prevention	11 Y, 6 N	Kramer	De La Paz
3) Judiciary	13 Y, 3 N w/CS	Jaroslav	Havlicak
4)			
5)			

SUMMARY ANALYSIS

Congress allowed states to assume jurisdiction over Indian territory by statute. Acting on this authorization, Florida assumed full criminal and civil jurisdiction over Indian land within its borders. This bill provides that the state's assumption of jurisdiction does not apply to existing Indian reservations of the Miccosukee Tribe of Indians of Florida. However, the bill also provides several exceptions to this:

- retrocession of jurisdiction is expressly limited to existing Miccosukee reservations;
- the state retains jurisdiction over civil causes of action involving any non-Indian party, although this retention of jurisdiction will sunset July 1, 2005; and
- the state retains jurisdiction over crimes with a non-Indian victim.

In short, under this bill, the state will no longer have jurisdiction over Indian-on-Indian crimes, or over civil actions involving only Indian parties, that take place on existing Miccosukee reservations.

This bill may have an indeterminate fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

1. Reduce government?	Yes[x]	No[]	N/A[]
2. Lower taxes?	Yes[]	No[]	N/A[x]
3. Expand individual freedom?	Yes[x]	No[]	N/A[]
4. Increase personal responsibility?	Yes[]	No[x]	N/A[]
5. Empower families?	Yes[]	No[]	N/A[x]

For any principle that received a "no" above, please explain:

This bill decreases personal responsibility because it withdraws state jurisdiction from places where it currently exists.

B. EFFECT OF PROPOSED CHANGES:

General Background

Article I, section 8 of the Constitution of the United States grants Congress the authority to "regulate Commerce … with the Indian Tribes." Based in part on this provision, and in part on the near-exclusive authority of the federal government to engage in foreign policy, courts historically regarded Indian tribal lands, being the territories of sovereign nations, as beyond the jurisdiction of state law to regulate.[1] Congress has exclusive and plenary authority over Indian affairs and, as such, states may only exercise jurisdiction over Indian lands if Congress expressly authorizes them to do so.[2]

Congress authorized the states to do so in 1953, when it enacted Public Law 83-280 (commonly referred to as "Public Law 280" or simply "PL 280").[3] This statute required five states (the so-called "mandatory jurisdictions") to assume full civil and criminal jurisdiction over Indian reservations within their borders.[4] PL 280 also allowed any other state ("optional jurisdictions") to assume total or partial jurisdiction over Indian reservations "by legislative action."

Pursuant to this authority, in 1961[5] the Florida Legislature enacted s. 285.16, F.S., which provides:

> 285.16 Civil and criminal jurisdiction; Indian reservation.—
>
> (1) The State of Florida hereby assumes jurisdiction over criminal offenses committed by or against Indians or other persons within Indian reservations and over civil causes of actions between Indians or other persons or to which Indians or other persons are parties rising within Indian reservations.
>
> (2) The civil and criminal laws of Florida shall obtain on all Indian reservations in this state and shall be enforced in the same manner as elsewhere throughout the state.

[1] *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).
[2] *See Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979); *United States v. Wheeler*, 534 U.S. 303 (1978); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973); *United States v. Daye*, 696 F.2d 1305 (11th Cir. 1983).
[3] 67 Stat. 588, currently codified as extensively amended at 18 U.S.C. § 1162 and 28 U.S.C. § 1360.
[4] The original five mandatory jurisdictions were California, Minnesota, Nebraska, Oregon and Wisconsin. Alaska was added as a sixth upon its admission to the Union in 1959. *See* Pub. L. 85-508, 72 Stat. 339.
[5] *See* ss. 1 and 2, ch. 61-252, L.O.F.

In 1968, Congress significantly amended PL 280. First, the amendments require that a tribe consent before a state may assume jurisdiction over tribal lands; however, this requirement was not made retroactive. Nine optional jurisdictions (including Florida) had assumed jurisdiction pursuant to PL 280 prior to the enactment of the 1968 tribal consent requirement.[6] Only one, Utah, has done so since.[7]

Additionally, the 1968 amendments allow the federal government to accept a "retrocession" by a state of any or all jurisdiction that the state previously assumed.[8] Pursuant to this provision, President Johnson issued an Executive Order authorizing the Interior Secretary (after consultation with the Attorney General in cases of retrocession of criminal jurisdiction) to accept any such retrocessions by notice published in the Federal Register, specifying the extent and effective date of the retrocession.[9]

Indian Country & Tribal Jurisdiction

Title 18 U.S.C. § 1151 defines "Indian country" as

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
>
> (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
>
> (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Although not mentioned in this definition, land held in trust by the United States for a tribe is also given this status.[10]

Criminal: An Indian tribe may regulate the activities of its members within its territory, including by the imposition of criminal penalties. The "Indian Civil Rights Act" prohibits a tribal court from being able to impose "punishment greater than imprisonment for a term of one year".[11] This act also "provides some statutory guarantees of fair procedure [such as guarantees relating to reasonable searches, speedy trial, and due process], but these guarantees are not equivalent to their constitutional counterparts."[12]

A tribe lacks criminal jurisdiction over non-members on its territory.[13] Furthermore, as the Supreme Court of the United States explained recently in *Nevada v. Hicks*,[14] federal law does not prevent a state from exerting investigative powers in Indian country with respect to crimes committed outside Indian country, such as by state law enforcement personnel entering Indian country and executing a state search warrant there.

Civil: Tribal authorities have much broader authority in civil rather than criminal matters. For instance, most ordinary tort, contract and property claims, of the sort usually governed by state rather than

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[6] The others are Arizona, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota and Washington.
[7] Utah assumed jurisdiction pursuant to PL 280 in 1971. *See* Utah Code §§ 9-9-201 through 9-9-213.
[8] *See* 25 U.S.C. § 1323(a).
[9] *See* Executive Order No. 11435, 33 F.R. 17339 (Nov. 21, 1968).
[10] *See Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505, 511 (1991).
[11] 25 U.S.C. § 1302(7).
[12] *Duro v. Reina*, 495 U.S. 676, 693 (1990). For example, the act specifies that the tribe shall not deny a person the right to have the assistance of counsel at his own expense. 25 U.S.C. § 1302(6) (emphasis added).
[13] *See Montana v. United States*, 450 U.S. 544 (1981); *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978).
[14] 533 U.S. 353 (2001).

federal law, must be exhausted in tribal court before they may be pursued in federal district court.[15] However, it does not appear that this exhaustion requirement must be met before a state court in a state that has assumed jurisdiction under PL 280 may hear such claims.

Federal/State Jurisdiction over Criminal Offenses

Determining whether a court has jurisdiction over a criminal offense committed on Indian land requires consideration of several factors including whether the Indian land is covered by PL 280, whether the offender is an Indian or a non-Indian and what offense has been committed. The following generally applies:

1. *Federal Criminal Jurisdiction in non-PL 280 States:* In the absence of Public Law 280, the federal "General Crimes Act" provides for federal jurisdiction over crimes between Indians and non-Indians in Indian country. The act applies state law where federal law provides no specific definition of the crime involved.[16] For example, the act would allow a United States Attorney to use Florida's DUI law to prosecute an Indian in federal court for a DUI offense which occurred in Indian country. This act specifically excludes offenses committed by an Indian against the person or property of another Indian as well as offenses committed by an Indian for which the Indian has been punished by the local law of the tribe.

   Federal jurisdiction over crimes committed by an Indian against another Indian is limited to offenses contained within the "Indian Major Crimes Act,"[17] which provides that:

   > (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, [rape, involuntary sodomy, felonious sexual molestation of a minor, carnal knowledge of a female not his wife who has not attained the age of sixteen years, assault with intent to commit rape], incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury … assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, [or embezzlement or theft within the "special maritime and territorial jurisdiction of the United States"] within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
   >
   > (b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

2. *Federal Criminal Jurisdiction in PL 280 states:* In states where PL 280 has given general criminal jurisdiction over reservations to the state government, the federal courts apparently retain jurisdiction over criminal laws of the United States that apply to acts that are federal crimes regardless of where committed (such as bank robbery and counterfeiting) to the same extent that they have jurisdiction over such offenses that occur off reservation.[18]

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[15] *See National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985). *But see El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999) (holding that tribal court exhaustion was not required where putative "common-law" claims were actually claims under a federal statute providing for mandatory removal from state court).

[16] *See* 18 U.S.C. § 1152. *See also* 18 U.S.C. § 13 ("Assimilative Crimes Act") (generally applying state criminal law with respect to crimes committed in federal enclaves such as national parks and military bases). This is "a method of punishing a crime committed on government reservations in the way and to the extent that it would have been punishable if committed within the surrounding jurisdiction." *United States v. Garcia*, 893 F.2d 250, 253 (10th Cir. 1989)

[17] Title 18 U.S.C. § 1153.

[18] *See United States v. Young,* 936 F.2d 1050, 1055 (9th Cir. 1991)("federal courts continue to retain jurisdiction over violations of federal laws of general, non- territorial applicability").

3. *State Criminal Jurisdiction in PL 280 states:* In states in which PL 280 applies (such as Florida), the state has jurisdiction over offenses committed in Indian country by either Indians or non-Indians.

4. *State Criminal Jurisdiction in non-PL 280 states*: States do not have criminal jurisdiction over offenses committed by Indians on Indian country in states where PL 280 is not applicable. A crime committed by a non-Indian against a non-Indian within Indian territory is apparently subject to state jurisdiction.[19]

Civil Jurisdiction in Florida

Based on PL-280, under Section 285.16, the State of Florida assumed jurisdiction "over civil causes of actions between Indians or other persons or to which Indians or other persons are parties arising within Indian reservations."

There are limitations on the state's jurisdiction. The United States Supreme Court has construed section 4 of PL 280 as granting civil jurisdiction only over private civil litigation in state courts, not to include general civil regulatory powers.[20] An example of this limitation of powers can be found where the Seminole Tribe of Florida sued to enjoin the enforcement of a state law restricting bingo operations to charitable organizations: the statute was declared to be "civil/regulatory" in nature rather than "criminal/prohibitory," and therefore unenforceable against the Seminole Indian Tribe.[21]

Further, although the state has jurisdiction over civil lawsuits between individual Indians and other persons, it does not have jurisdiction in suits brought by other persons against a tribe itself, unless there has been an express waiver of tribal sovereign immunity.[22]

Indian Country in Florida

Two federally recognized Indian tribes have lands within the borders of Florida: the Seminole Tribe of Florida, Inc. ("Seminoles"); and the Miccosukee Tribe of Indians of Florida ("Miccosukees"). The Seminoles have lands scattered throughout central and south Florida, with concentrations centered around Dania, Big Cypress and Brighton. The Miccosukees have a single contiguous area of roughly 285,000 acres in Miami-Dade and Broward Counties.

The vast majority of these lands are not reservation, but either lands perpetually leased from the state or lands held in trust by the federal government for tribal benefit (so-called "tribal trust lands"). In 1998, Congress designated a strip of Miccosukee land on the northern border of Everglades National Park as the Miccosukee Reserved Area ("MRA"), and provided that state jurisdiction assumed under PL 280 does not apply there.[23] Accordingly, on the MRA, s. 285.16, F.S., does not apply so the state does not have criminal or civil jurisdiction there.

However, the Miccosukees also have tribal reservation lands outside the Miccosukee Reserved Area. These lands consist of a 47-acre commercial parcel in western Miami-Dade County at the NW corner of the intersection of Krome Avenue and U.S. 41, a 0.92-acre commercial parcel in western Miami-Dade County at the SW corner of the intersection of Krome Avenue and U.S. 41, and a 46.36 acre commercial/residential parcel located adjacent to the MRA. On these lands, s. 285.16, F.S., is applicable so the state currently does have criminal and civil jurisdiction there.

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[19] *See United States v. McBratney*, 104 U.S. 621 (1881); *United States v. Prentiss*, 256 F.3d 971 (10th Cir. 2001).
[20] *See Bryan v. Itasca County*, 426 U.S. 373 (1976). *See also Serian v. State*, 558 So.2d 251 (Fla. 1991)(holding that statute prohibiting practicing optometry without a license is criminal/prohibitory in nature and therefore can be enforced even if offense takes place on Indian reservation).
[21] *See Seminole Tribe v. Butterworth*, 491 F.Supp. 1015 (S.D. Fla. 1980).
[22] *See Houghtaling v. Seminole Tribe of Florida*, 611 So.2d 1253 (Fla. 1993).
[23] *See* Pub. L. 105-313, 112 Stat. 2964 ("Miccosukee Reserved Area Act").

The Seminoles do not have a tribal court system. The Miccosukees have a tribal court consisting of two judges, one "traditional" and one "contemporary." The Miccosukees adopted a Tribal Civil and Criminal Code in 1978. Crimes by one Miccosukee against another within Indian country are prosecuted by Assistant Council Attorneys on behalf of the Tribal Council (other than those crimes designated by the Indian Major Crimes Act for exclusively federal prosecution).

Federal legislation enacted in 2001 provides significant funding and other assistance to tribes in operating and possibly upgrading their judicial systems.[24]

Proposed Changes

This bill amends s. 285.16, F.S., to create an exception to the State's assumption of jurisdiction over criminal offenses committed on Indian reservations and civil causes of action arising within Indian reservations. The bill provides that the assumption of jurisdiction does not apply to existing Indian reservations of the Miccosukee Tribe of Indians of Florida. However, the bill also provides several exceptions to this:

- retrocession of jurisdiction is expressly limited to existing Miccosukee reservations;
- the state retains jurisdiction over civil causes of action involving any non-Indian party, although this retention of jurisdiction will sunset July 1, 2005; and
- the state retains jurisdiction over crimes with a non-Indian victim.

In short, under this bill, the state will no longer have jurisdiction over Indian-on-Indian crimes, or over civil actions involving only Indian parties, that take place on existing Miccosukee reservations. If a criminal offense was committed by an Indian against an Indian, the federal government would only have jurisdiction over the offense if it was one of the offenses included in the "Indian Major Crimes Act". If an offense was committed by an Indian against an Indian and was not one of the crimes listed in that Act, the tribe would have exclusive jurisdiction.

C. SECTION DIRECTORY:

Section 1: Amends s. 285.16, F.S. to provide that the State's assumption of criminal and civil jurisdiction over Indian reservations does not apply to reservations of the Miccosukee Tribe of Indians of Florida.

Section 2: Provides an effective date of upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill may reduce fees collected by the state courts with respect to civil or criminal proceedings regarding events on Indian reservations.

2. Expenditures:

   This bill may reduce prosecution expenditures with respect to crimes committed on Indian lands.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

[24] *See* Pub. L. 106-559, 114 Stat. 2778 ("Indian Tribal Justice and Legal Assistance Act"), now codified at 25 U.S.C. §§ 3651-81.

1. Revenues:

   None.

2. Expenditures:

   This bill may reduce local law enforcement expenditures with respect to crimes committed on Indian lands.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, does not appear to reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not appear to reduce the percentage of state tax shared with counties or municipalities.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

As a matter of federal law, Florida may not be able to unilaterally withdraw its current jurisdiction over Indian country within its borders. Under Executive Order 11435, the Secretary of the Interior must consent on behalf of the federal government to any state seeking to retrocede jurisdiction assumed pursuant to PL 280. In practice, such consent has always been forthcoming, but it is particularly unclear what legal effect this requirement might have in the time between this bill's effective date and publication of the Interior Secretary's consent in the Federal Register.

It is possible that this bill may make it difficult for the state to investigate and prosecute Indians and non-Indians alike, who have committed a crime off "Indian country" but fled there. Because this bill eliminates the provision in s. 285.16, F.S., that state law shall be enforced in the same manner on a reservation as off, the state might be required to seek extradition of such suspects in tribal courts or other tribal cooperation in order to achieve service of process, even though the state technically retains jurisdiction. Moreover and for the same reason, this bill may require any party, including the state and private parties, to obtain a federal subpoena or search warrant if that party wishes to pursue evidence that is in Indian country. However, in the event that Florida retrocedes jurisdiction over Miccosukee lands, it may also be possible that any problem obtaining service on residents of tribal lands could be resolved in conformity with due process by a system of substituted service similar to that used for corporations.

It should be pointed out that the retrocession effected by this bill clearly extends beyond the enrolled members of the Miccosukee Tribe. Pursuant to federal statute, Indian tribes are recognized to possess "inherent power… to exercise criminal jurisdiction over all Indians."[25] Thus, unless subject to federal prosecution under the Indian Major Crimes Act, Indian-on-Indian crimes on Miccosukee land involving non-Miccosukee Indians would be subject to exclusive Miccosukee jurisdiction under this bill. It remains uncertain what the effect of this bill might be with respect to civil actions involving non-Miccosukee Indians.

Finally, regardless of this bill, crimes committed in Indian country remain subject to federal prosecution, both exclusively and concurrently with tribal authorities, to an extent specified by Congress. Many such prosecutions are indirectly subject to some state legislative input, since under the Indian Major Crimes Act, state criminal law defines federally-prosecuted crimes that have no specific federal definition. Moreover, regardless of this bill, PL 280 remains subject to Congressional modification or repeal.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On March 11, 2003, the House Subcommittee on Criminal Justice recommended this bill favorably without amendment.

On April 10, 2003, the House Committee on Public Safety & Crime Prevention reported this bill favorably without amendment.

On April 14, 2003, the House Committee on Judiciary adopted one amendment to this bill. This amendment provides that: 1) retrocession of jurisdiction is limited to existing Miccosukee reservations; 2) the state retains jurisdiction over civil causes of action involving any non-Indian party, although this retention of jurisdiction will sunset July 1, 2005; and 3) the state retains jurisdiction over crimes with a non-Indian victim. The Committee then reported this bill favorably with a committee substitute, the substance of which is reflected in this analysis.

[25] Title 25 U.S.C. § 1301(2) (emphasis added). *See also Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Montana v. United States*, 450 U.S. 544 (1981).